No. 12,573

IN THE

United States Court of Appeals

For the Ninth Circuit

G. CLIFFORD SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant respectfully prays that this cause be reheard and reconsidered, and prays for a reconsideration of the opinion filed herein February 26, 1951, by reason of all the records and files herein and because of the following points in which the appellant believes that the Court fell into substantial and serious error on the legal and factual issues involved and presented by the appeal in this cause:

I.

Appellant stressed one point only on his appeal, the issue raised by Item 8 of the Specifications of Error. This was the basis of Judge Denman's dissenting opinion filed herein and this is the only point of error to which this Petition is directed. It concerns the conduct and language of the Court in recalling the jury from their deliberations and admonishing them in language hereinafter set forth.

In sustaining the conviction, the majority opinion of this Court answers appellant on this point by holding (1) that prior instructions given by the judge covered any possible misconception or error that might have been made by him at this later time, and (2) that the jury was able thereafter to arrive at a quick verdict because they disregarded the irrelevancies with which they had been concerned. It is held that the relevant matters being simple and supported by overwhelming evidence the jury was able to agree after a short period of deliberation.

It is the position of this appellant that a closer consideration and review of the record will not sustain either of these holdings.

Without intending to be repetitious, but because it is the crux of the whole matter, we respectfully direct the Court's attention again to the language of the Court, taken from pages 191 and 192 of the Transcript:

> "The Court: Ladies and Gentlemen, you have been out now for about an hour and it is getting

late. I understand you have not reached a verdict. I want to advise you that if there isn't a verdict by 5:20 o'clock I shall be available after dinner and up until 9:00 o'clock, *providing the elevators here are running.* If they make provisions for elevator service I will be available until 9:00 o'clock, otherwise I shall receive your verdict in the morning.

It might interest you to know that your conversations have been so loud in the jury room that you have been heard all over this portion of the building.

It is very apparent the jury is paying very little attention to the court's instructions. You are arguing as to whether I am a tough judge or not and whether the entire outfit should be in court. Those are things I told you to stay away from. However those have been the subjects of your arguments.

I thought you might be interested to know that. We have heard everything you have said, particularly when your voices were raised. I am making these comments but *you don't have to pay any attention to my instructions unless you want to* and you are privileged to discuss me, but I don't happen to be the defendant in this case and I am not interested in your verdict except that you arrive at one.

I have instructed the bailiff to provide you with dinner if you haven't arrived at a verdict by 5:20. If you arrive at a verdict after that and I can get in the building I will be here to receive it, but I am not going to put myself in the same position that Judge Speakman is in by climbing

stairs at night. If I can get an elevator I will receive your verdict up to 9:00 o'clock. If you haven't arrived at a verdict by that time comfortable quarters will be provided for you in a hotel.

I am making this statement so you will understand why I can't stay here indefinitely and why provisions will be made for you.

With that you are instructed to retire to your jury room."

[Italics ours.]

We believe it is very important to note that the judge uses the word "instructions" not once but twice. In the third paragraph he says:

"It is very apparent the jury is paying very little attention to the court's instructions."

At this point there can be no mistake but that he is referring to his previous "Instructions" given before the jury retired.

Then in the very next paragraph he says:

"I am making these comments but you don't have to pay any attention to my instructions unless you want to * * *"

Coming as this does directly after the previous reference to "Instructions" we feel the jury could only draw one possible conclusion as to what "Instructions" the judge was talking about. The word "Instructions" had not been used anywhere else except on page 182 of the Transcript, where the judge

said: "* * * it is your duty to follow my instructions as to the law."

In all fairness, how can it be said that any other and prior instructions cured this error? Nor is there any subsequent comment by the judge to cure this last all inclusive "instruction."

II.

Relative to the Second Point in the Court's opinion, we do not believe that the determination of the guilt or innocence of appellant was a simple matter, supported by overwhelming evidence. On the contrary, we believe that there was a clear conflict of testimony to be considered by the jury.

We respectfully call the Court's attention to the nature of the offense here involved. The judge instructed the jury that they must find (1) that a false claim was filed and (2) that the defendant knew it was false. (Transcript p. 185.) He further instructed, on page 187 of the transcript, as follows:

> "The defendant has offered himself as a witness and has testified in the case. Having done so you are to estimate and determine his credibility in the same way as you would consider the testimony of other witnesses."

As the case stood at its conclusion, the only real issue for the jury appeared to be whether the defendant knew the claim was false at the time it was presented.

This issue was largely a subjective matter on which the jury would be influenced to a great degree by the testimony of the defendant himself.

At three separate places in the transcript defendant categorically denies that he had any knowledge that the claim was false when presented.

For the Court's consideration, we respectfully quote the transcript (pages 158, 159 and 160):

> The Court: Well, you knew whether or not the tools had been delivered to the institution?
>
> The Witness: No, sir, I did not.
>
> * * * * * *
>
> The Court: Then as I understand your testimony you didn't know of your own knowledge whether these receipts reflected the truth or not?
>
> The Witness: Of my own knowledge no, sir.
>
> The Court: You relied upon these statements?
>
> The Witness: That is correct, sir, I did.
>
> The Court: And that is your contention here today?
>
> The Witness: That is right, sir. I couldn't handle every phase of it myself.
>
> The Court: The only thing I am asking you if that is your position?
>
> The Witness: That is correct, sir.
>
> * * * * * *
>
> Q. Did you know whether they had not or had been delivered to them?
>
> A. To my knowledge they had been delivered, Mr. Peterson."

It is appellant's position that there was no additional evidence to prove conclusively that appellant knew the claim was false.

This vital element of proof, therefore, was clearly in dispute and until the judge informed the jury they could disregard the instructions as herein quoted it is our contention that the jury was unable to agree. This is even further demonstrated by the fact the jury was overheard to discuss "whether the entire outfit should be in court" (Trans. p. 191). A review of the record shows that other officers of the school actually handled the supplies and were in a far better position to have knowledge of the truth or falsity of the claim than this appellant.

III.

Our concluding argument would direct the Court's attention to the time limit feature of the judge's final admonition. At 5:05 he gave the jury until 5:20, a period of fifteen minutes, in which to reach a verdict or be locked up for the night. Yet the jury did not actually return with a verdict until 5:35.

Is it not being realistic to believe that there were a few jurors who were not convinced of the guilt of the defendant beyond a reasonable doubt even at the 5:20 deadline, but who by 5:35 were, in the words of the minority opinion of Judge Denman, persuaded "not to bother about the burden of proof" but "settle our quarrels and go home."

CONCLUSION.

We sincerely believe that a careful reconsideration of the record will convince this Court that the jury concluded but one thing from the Judge's admonitions when he called them out of their deliberations, to wit, that they could disregard his prior instructions if they so desired.

Under these circumstances, and with a dead line of fifteen minutes in which to decide, they still took thirty minutes to bring in what in our opinion was a compromise—a verdict of guilty with a recommendation of leniency.

We respectfully submit that this appellant was deprived of a fair trial by an impartial jury as guaranteed by the Constitution of the United States.

Dated, San Francisco, California,
March 26, 1951.

Respectfully submitted,
H. C. Wheeler,
Irving Kipnis,
Jackson E. Nichols,
Attorneys for Appellant and Petitioner.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

Dated, San Francisco, California,
March 26, 1951.

Respectfully submitted,
Jackson E. Nichols,
Of Counsel for Appellant and Petitioner.